No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL A. NEWDOW, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the inclusion of the phrase "under God" in the Pledge of Allegiance to the United States Flag violates the Establishment Clause of the First Amendment.

2. Whether a noncustodial parent, who lacks the legal authority to determine his child's education or religious upbringing, has Article III standing to challenge educational practices undertaken by the school in which the custodial parent has chosen to place the child.

PARTIES TO THE PROCEEDING

The respondents are Michael A. Newdow, who was the plaintiff below, and the Elk Grove Unified School District and its Superintendent, David W. Gordon, who were defendants below. The Complaint also named as defendants the United States Congress, President George W. Bush,* the Sacramento City Unified School District, and its superintendent, Jim Sweeney. All of those defendants were dismissed from the case by the court of appeals. App., *infra*, 5a-8a. The Complaint also named the State of California as a defendant, but the State did not participate in the district court proceedings or in the court of appeals, until the rehearing stage, at which point the court of appeals rejected the State's appearance. *Id.* at 6a. The motions of Sandra Banning, the mother of respondent Newdow's child, and the United States Senate to intervene were denied by the court of appeals. *Id.* at 99a-109a.

* The Complaint originally listed President William J. Clinton as a defendant. Pursuant to Federal Rule of Appellate Procedure 43(c)(2), President Bush was substituted as his successor in office.

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The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion of the court of appeals on rehearing (App., *infra*, 1a-24a) is reported at 321 F.3d 772. The original opinion of the court of appeals (App., *infra*, 25a-58a) is reported at 292 F.3d 597, and the court's subsequent opinion on standing (App., *infra*, 89a-98a) is reported at 313 F.3d 500. The opinion and orders of the court denying intervention (App., *infra*, 99a-109a) are reported at 313 F.3d 495 and 313 F.3d 506. The order of the district court (App., *infra*, 110a), adopting the Findings and Recommendation of

the magistrate judge that the case be dismissed (App., *infra*, 111a-112a), is unreported.

JURISDICTION

The court of appeals entered its original judgment on June 26, 2002. The court issued an amended opinion on rehearing on February 28, 2003. The court of appeals issued an order staying its mandate on March 4, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

No federal statute waives the sovereign immunity of the United States of America from a suit for declaratory or injunctive relief under the First Amendment, and thus the jurisdictional basis for respondent Newdow's suit against the United States is unclear.[1] However, the absence of such a waiver is without jurisdictional consequence in this case because the United States could have, and should hereby be deemed to have, intervened as of right in this action against the school district and its superintendent to defend the constitutionality of the Pledge of Allegiance against Newdow's facial and as-applied challenges. See 28 U.S.C. 2403(a).[2]

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[1] Other than a separate claim against the President in his official capacity, Newdow did not sue an officer or an agency of the United States, so his claim does not appear to fall within the scope of either *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), or the Administrative Procedure Act, 5 U.S.C. 552. Nor is his federal constitutional claim cognizable under the Federal Tort Claims Act, 28 U.S.C. 1346, 1402, 2671 *et seq.* See *FDIC* v. *Meyer*, 510 U.S. 471, 477 (1994).

[2] Newdow's as-applied challenge to the recitation of the Pledge in elementary schools calls into question the federal government's practice under which the nearly 2500 military dependents attending its four schools within the Ninth Circuit are led in a voluntary recitation of the Pledge of Allegiance daily.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part, that "Congress shall make no law respecting an establishment of religion. * * *"

Section 4 of Title 4 of the United States Code provides that the Pledge of Allegiance to the United States Flag shall be: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all."

STATEMENT

1. In 1942, as part of an overall effort to "codify and emphasize existing rules and customs pertaining to the display and use of the flag of the United States of America," Congress enacted a Pledge of Allegiance to the United States flag. H.R. Rep. No. 2047, 77th Cong., 2d Sess. 1 (1942); S. Rep. No. 1477, 77th Cong., 2d Sess. 1 (1942). As originally enacted, the Pledge of Allegiance read: "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all." Act of June 22, 1942, ch. 435, § 7, 56 Stat. 380.

Twelve years later, Congress amended the Pledge of Allegiance by adding the words "under God" after the word "Nation." Act of June 14, 1954, ch. 297, § 7, 68 Stat. 249. Accordingly, the Pledge now reads: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." 4 U.S.C. 4.

In amending the Pledge, the Committee Reports noted that, "[f]rom the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God." H.R. Rep. No. 1693, 83d Cong., 2d Sess. 2 (1954); see also S.

Rep. No. 1287, 83d Cong., 2d Sess. 2 (1954) ("Our forefathers recognized and gave voice to the fundamental truth that a government deriving its powers from the consent of the governed must look to God for divine leadership. * * * Throughout our history, the statements of our great national leaders have been filled with references to God."). Both Reports traced the numerous references to God in historical documents central to the founding and preservation of the United States, from the Mayflower Compact to the Declaration of Independence to President Lincoln's Gettysburg Address, the latter having employed the same reference to a "Nation[] under God." H.R. Rep. No. 1693, *supra*, at 2; S. Rep. No. 1287, *supra*, at 2.

The Reports further explained that the amendment would highlight a foundational difference between the United States and Communist nations: "Our American Government is founded on the concept of the individuality and the dignity of the human being" and "[u]nderlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp." H.R. Rep. No. 1693, *supra*, at 1-2; see also S. Rep. No. 1287, *supra*, at 2. As amended, the Pledge would thus textually reject the "communis[t]" philosophy "with its attendant subservience of the individual." H.R. Rep. No. 1693, *supra*, at 2; see also S. Rep. No. 1287, *supra*, at 2 ("The spiritual bankruptcy of the Communists is one of our strongest weapons in the struggle for men's minds and this resolution gives us a new means of using that weapon."). The House Report further noted that, through "daily recitation of the pledge in school," "the children of our land * * * will be daily impressed with a true understanding of our way of life and its origins," so that "[a]s they grow and advance in this understanding, they will assume the responsibilities of self-government equipped

to carry on the traditions that have been given to us." H.R. Rep. No. 1693, *supra*, at 3.

Both the Senate and House Reports expressed the view that, under controlling precedent from this Court, the amendment "is not an act establishing a religion or one interfering with the 'free exercise' of religion." H.R. Rep. No. 1693, *supra*, at 3 (citing *Zorach* v. *Clauson*, 343 U.S. 306 (1952)); see also S. Rep. No. 1287, *supra*, at 2.[3]

2. California law requires that each public elementary school in the State "conduct[] * * * appropriate patriotic exercises" at the beginning of the school day. Cal. Educ. Code § 52720 (West 1989). The law provides that "[t]he giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section." *Ibid.* In satisfaction of that statutory requirement, respondent Elk Grove Unified School District (Elk Grove) has adopted a policy that directs each of its elementary schools to "recite the pledge of allegiance to the flag once each day." App., *infra*, 27a. No child is compelled to join in reciting the Pledge. *Id.* at 28a.

Respondent Michael Newdow is the noncustodial father of a child enrolled in a public elementary school within the jurisdiction of respondent Elk Grove. App., *infra*, 2a, 90a-91a. In the school that Newdow's daughter attends, the teacher leads the students in reciting the Pledge of Allegiance daily. *Id.* at 3a.

The child's mother has "*sole* legal custody as to the rights and responsibilities to make decisions relating to the health, education and welfare of" the child. App., *infra*, 90a-91a. While Newdow, who was never married to the child's

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[3] Following the court of appeals' decision in the instant case, Congress reaffirmed the content of the Pledge of Allegiance and Congress's view that the legislation is constitutional. Act of Nov. 13, 2002, Pub. L. No. 107-293, 116 Stat. 2059.

mother, retains limited visitation rights, the right to access the child's school and medical records, and the right to "consult" on "substantial" decisions pertaining to the child's "educational needs," if the parents disagree, the child's mother "may exercise legal control of" the child as long as it "is not specifically prohibited or inconsistent with the physical custody order." *Id.* at 91a.

In March 2000, Newdow filed suit against the President, the United States Congress, the United States of America, the State of California, and two California school districts and their superintendents, seeking a declaration that the 1954 statute adding the words "under God" to the Pledge is "facially unconstitutional" under the Establishment and Free Exercise Clauses of the First Amendment. Compl. 6, 36; App., *infra*, 4a-5a. He also sought injunctive relief requiring Congress and the President to remove those words from the Pledge and prohibiting California schools from leading students in reciting the Pledge. Compl. 37; App., *infra*, 4a-5a. The Complaint explains that Newdow's child is "an unnamed plaintiff whom he represents as 'next friend.'" Compl. 3. The Complaint asserts that the recitation of the Pledge in his child's school "results in the daily indoctrination of the Elk Grove Unified School District's students—including Plaintiff's daughter—with religious dogma," *id.* at 18-19, and that such actions "infringe[]" upon Newdow's "unrestricted right to inculcate in his daughter— free from governmental interference—the atheistic beliefs he finds persuasive." *Id.* at 20; see also *id.* at 36. The Complaint further asserts that Newdow's "position as the father of a child attending the State's public schools grants him standing in this matter in his own right and on behalf of his daughter." *Id.* at 26.

The district court dismissed the complaint for failure to state a claim, relying on numerous decisions of this Court expressly addressing the Pledge and describing it as con-

sistent with the Establishment Clause, as well as on a decision of the Seventh Circuit rejecting a similar challenge to the Pledge. App., *infra*, 110a-112a (adopting magistrate judge's Findings and Recommendation, which cites *County of Allegheny* v. *ACLU*, 492 U.S. 573 (1989); *id.* at 625 (O'Connor, J., concurring); *Lynch* v. *Donnelly*, 465 U.S. 668 (1984); *School Dist. of Abington Township* v. *Schempp*, 374 U.S. 203 (1963) (Brennan, J., concurring); *Sherman* v. *Community Consol. Sch. Dist. 21*, 980 F.2d 437 (7th Cir. 1992), cert. denied, 508 U.S. 950 (1993)).

3. a. A divided panel of the Ninth Circuit affirmed in part and reversed in part. App., *infra*, 25a-58a. As an initial matter, all three members of the panel agreed that the President and Congress should be dismissed from the lawsuit, on the grounds that the President is not a proper defendant for challenging the constitutionality of a federal law under *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992) (plurality opinion), and that the Congress cannot be sued under the Speech and Debate Clause, U.S. Const. Art. I, § 6, Cl. 1. See App., *infra*, 29a-30a; *id.* at 53a (Fernandez, J., concurring and dissenting). The court also ruled that Newdow lacked standing to file suit against the Sacramento City Unified School District and its superintendent "because his daughter is not currently a student there." *Id.* at 32a.

The court did conclude, however, that Newdow has standing to challenge Elk Grove's policy of reciting the Pledge "because his daughter is currently enrolled in elementary school" in Elk Grove. App., *infra*, 32a. In addition, a majority of the court concluded that Newdow has standing in his own right to challenge the facial constitutionality of the 1954 Act amending the Pledge because "the mere enactment of a statute may constitute an Establishment Clause violation," *id.* at 33a, and the 1954 Act amounts to a "religious recitation

policy that interferes with Newdow's right to direct the religious education of his daughter." *Id.* at 37a.[4]

b. Turning to the merits of Newdow's complaint, the majority held that, with the addition of the phrase "under God," the Pledge of Allegiance violates the Establishment Clause. App., *infra*, 37a-42a. The majority began by explaining that this Court has adopted three different tests to analyze Establishment Clause violations (*id.* at 37a)—the three-prong test outlined in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); the "endorsement test," *County of Allegheny*, *supra*; and the "coercion" test, *Lee* v. *Weisman*, 505 U.S. 577 (1992)—and that the court of appeals was "free to apply any or all of the three tests, and to invalidate any measure that fails any one of them." App., *infra*, 41a.

The majority held that the 1954 Act and the school district policy failed the "endorsement test" both because the Pledge's reference to God "is a profession of a religious belief, namely, a belief in monotheism" and because it "impermissibly takes a position with respect to the purely religious question of the existence and identity of God." App., *infra*, 41a-42a. The majority further concluded that the 1954 Act and the school district's policy fail the "coercion test" because "the mere fact that a pupil is required to listen every day to the statement 'one nation under God' has a coercive effect." *Id.* at 45a.

Finally, the majority concluded that the Pledge fails the *Lemon* test because it has the purpose of advancing religion. App., *infra*, 46a. In so holding, the majority rejected the United States' argument that the Pledge should be looked at "as a whole," and concluded that the "*sole* purpose" of the 1954 Act was to "advance religion, in order to differentiate

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[4] The court did not address the constitutionality of the California law requiring patriotic exercises in elementary school classrooms. App., *infra*, 30a-31a.

the United States from nations under communist rule." *Id.* at 46a-47a. The majority further concluded that Elk Grove's policy ran afoul of the *Lemon* test because it "convey[s] an impermissible message of endorsement to some and disapproval to others of their beliefs regarding the existence of a monotheistic God." *Id.* at 50a.

The majority dismissed in a footnote the numerous statements by this Court and its Members expressly addressing the Pledge and affirming its constitutionality as "dicta" that was announced without "appl[ying] any of the three tests to the Act." App., *infra*, 50a-51a n.12. The majority also expressly disagreed with the analysis and conclusion of the Seventh Circuit in *Sherman*, *supra*, which upheld the Pledge against a similar Establishment Clause challenge. *Ibid.*

c. Judge Fernandez dissented. App., *infra*, 52a-58a. Judge Fernandez first expressed his "serious misgivings" about the majority's conclusion that Newdow had standing to challenge the facial constitutionality of the 1954 Act, but ultimately concluded that the question "makes little difference to the resolution of the First Amendment issue in this case." *Id.* at 53a n.1. With respect to the Establishment Clause challenge, Judge Fernandez explained that "such phrases as 'In God We Trust,' or 'under God' have no tendency to establish a religion in this country or to suppress anyone's exercise, or non-exercise, of religion, except in the fevered eye of persons who most fervently would like to drive all tincture of religion out of the public life of our polity." *Id.* at 55a. Judge Fernandez also noted that this Court has repeatedly indicated that the Pledge's text, as amended, does not violate the Establishment Clause, and he agreed with the Seventh Circuit that the court of appeals should "respect" those assurances: "If the Court proclaims that a practice is consistent with the establishment clause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so." *Ibid.* (quoting *Sherman*,

980 F.2d at 448). Finally, Judge Fernandez accused the majority of confining itself to legal "elements and tests, while failing to look at the good sense and principles that animated those tests in the first place." *Id.* at 57a; see also *id.* at 57a n.8 (noting that the majority's holding would preclude use of many patriotic songs, such as "God Bless America," "America the Beautiful," "The Star Spangled Banner," and "My Country 'Tis of Thee," in public ceremonial occasions).

d. While the case was pending on the United States' and Elk Grove's petitions for rehearing and rehearing en banc, the mother of Newdow's child notified the court that Newdow lacked legal custody of the child and legal control over the child's educational and religious upbringing. She further advised that, as the custodial parent, she "wish[es] for her child to be able to recite the Pledge at school exactly as it stands." Banning C.A. Mot. to Intervene 10. The United States then filed a motion to enlarge the record and a supplemental brief arguing that Newdow lacks standing to prosecute his challenge to the Pledge on its face or as applied by Elk Grove.

The court of appeals issued a separate decision holding that Newdow has standing to prosecute his constitutional challenge to the Pledge. App., *infra*, 89a-98a. The court concluded that, while Newdow no longer could prosecute the action on behalf of or to vindicate the interests of his child, Newdow continued to have standing in his own right to challenge "unconstitutional government action affecting his child." *Id.* at 92a. The court noted that the custody agreement does not strip Newdow of all of his parental rights, because he retains the "the right to inspect his daughter's school and medical records" and the "right to consult" on educational decisions, albeit with the mother "having ultimate decision-making power." *Id.* at 95a. The court then reasoned that, because California law recognizes a right in

noncustodial parents to "expose" their children to their beliefs and values, Newdow was injured because state law "surely does not permit official state indoctrination of an impressionable child on a daily basis with an official view of religion contrary to the express wishes of *either* a custodial or noncustodial parent." *Id.* at 96a. The court further reasoned that Newdow has standing because the mother "has no power, even as sole legal custodian, to insist that her child be subjected to unconstitutional state action." *Ibid.* Because the Pledge, in the court's view, "provides the message to Newdow's young daughter" that "her *father's* beliefs are those of an outsider, and necessarily inferior to what she is exposed to in the classroom," the court concluded that Newdow has suffered a legally cognizable injury that provides him with Article III standing. *Id.* at 97a.[5]

4. a. The court issued an amended opinion on rehearing. App., *infra*, 1a-24a. In its amended opinion, the court limited its Establishment Clause holding to the Pledge's use by Elk Grove in its schools. *Id.* at 18a. With respect to Newdow's challenge to the facial constitutionality of the Pledge, the court of appeals vacated the district court's decision in favor of the United States and remanded "for further proceedings consistent with our holding." *Ibid.*

In addition, the court amended its decision to hold only that Elk Grove's policy violated the coercion test, and did not address either the "endorsement test" or the *Lemon* test. App., *infra*, 11a. The panel, however, concluded that the recitation of the Pledge violated the coercion test for the same reasons that the original opinion found a violation of the endorsement test. Compare *id.* at 11a-13a, with *id.* at 41a-43a.

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[5] Judge Fernandez concurred in the judgment on standing, but not in the majority's "allusions to the merits of the controversy." App., *infra*, 98a.

The court also elaborated on its rejection of the numerous statements in this Court's opinions affirming the constitutionality of the Pledge and similar official acknowledgments of the Nation's religious heritage. The court assumed that "public officials do not unconstitutionally endorse religion when they recite the Pledge," but that schools nevertheless could not "coerce impressionable young schoolchildren to recite it, or even to stand mute while it is being recited by their classmates." App., *infra*, 15a. The court also purported to distinguish references to God in the Pledge from those in the Declaration of Independence and National Anthem on the ground that the pledge "is a performative statement." *Id.* at 16a; see also *ibid.* ("To pledge allegiance to something is to alter one's moral relationship to it, and not merely to repeat the words of an historical document or anthem.").

Judge Fernandez dissented from the court's Establishment Clause holding for the same reasons discussed in his initial dissenting opinion. App., *infra*, 19a-24a. Judge Fernandez also noted that, although the majority "now formally limits itself to holding that it is unconstitutional to recite the Pledge in public classrooms, its message that something is constitutionally infirm about the Pledge itself abides and remains a clear and present danger to all similar public expressions of reverence." *Id.* at 19a n.1.

b. Judge O'Scannlain, joined by Judges Kleinfeld, Gould, Tallman, Rawlinson, and Clifton, filed a lengthy dissent from the court of appeals' denial of rehearing en banc. App., *infra*, 67a-87a. He described the panel opinion as

> wrong, very wrong—wrong because reciting the Pledge of Allegiance is simply not "a religious act" as the two-judge majority asserts, wrong as a matter of Supreme Court precedent properly understood, wrong because it

> set up a direct conflict with the law of another circuit, and wrong as a matter of common sense.

Id. at 67a-68a (footnote omitted). Judge O'Scannlain stressed that this Court consistently has distinguished between "patriotic invocations of God on the one hand," and public school "prayer, an 'unquestioned religious exercise.'" *Id.* at 72a. Judge O'Scannlain further noted that, until the panel's decision here, "[n]o court, state or federal, has *ever* held, even now, that the Supreme Court's school prayer cases apply outside a context of state-sanctioned formal religious observances." *Id.* at 78a-79a. Finally, Judge O'Scannlain noted that, while the panel "adopts a stilted indifference to our past and present realities as a predominantly religious people," *id.* at 86a-87a, "the Supreme Court has displayed remarkable consistency—patriotic invocations of God simply have no tendency to establish a state religion," *id.* at 86a.

Judges McKeown, Hawkins, Thomas, and Rawlinson separately dissented from the denial of rehearing en banc on the ground that the case "presents a constitutional question of exceptional importance" that should be heard by the court en banc. App., *infra*, 88a.

REASONS FOR GRANTING THE PETITION

Two decisions of this Court have said without qualification that the Pledge of Allegiance is constitutional. Numerous other opinions, joined in by at least twelve Justices of this Court, have likewise expressly addressed and affirmed the constitutionality of the Pledge of Allegiance notwithstanding its reference to God. No Justice has expressed the view that the Pledge violates the Establishment Clause. The court of appeals, however, dismissed those majority and separate opinions as unconsidered dicta. But a fair reading of this Court's decisions demonstrates that those consistent and oft-repeated statements stand as a fixed lodestar in this Court's

Establishment Clause jurisprudence that has informed and directed the resolution of a number of the Court's cases. They reflect a point of exceptional unity and consistent agreement among Members of this Court within Establishment Clause jurisprudence. Whatever else the Establishment Clause may prohibit, this Court's precedents make clear that it does not forbid the government from officially acknowledging the religious heritage, foundation, and character of this Nation. That is what the reference to God in the Pledge of Allegiance does. The Pledge is therefore constitutional, as the Seventh Circuit held when confronted with the same Establishment Clause challenge. Because the court of appeals' error is so manifestly contrary to precedent, the Court may wish to consider summary reversal of the decision below.

1. This Court's review is warranted because the court of appeals' holding conflicts with repeated opinions of this Court and of individual Justices consistently explaining that the Pledge of Allegiance, and similar official acknowledgments of the Nation's religious heritage and character, do not violate the Establishment Clause. The holding below is also in direct conflict with the Seventh Circuit's decision in *Sherman* v. *Community Consolidated School District 21*, 980 F.2d 437 (1992), cert. denied, 508 U.S. 950 (1993), which rejected the same Establishment Clause challenge to the Pledge.

a. The court of appeals' decision is irreconcilable with this Court's repeated assurances that the Pledge of Allegiance, with its reference to God, comports with the strictures of the Establishment Clause. In *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), the Court held that a city did not violate the Establishment Clause by including a nativity scene as part of a Christmas display. In upholding the display, the Court reasoned that "[t]here is an unbroken history of official acknowledgment by all three branches of government

of the role of religion in American life from at least 1789." *Id.* at 674. The Court noted that its own opinions had "asserted pointedly" that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Id.* at 675 (quoting *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952), and citing *School Dist. of Abington Township* v. *Schempp*, 374 U.S. 203, 213 (1963)). The Court further reasoned that "examples of reference to our religious heritage are found * * * in the language "One nation under God," as part of the Pledge of Allegiance to the American flag," which "is recited by many thousands of public school children—and adults—every year." *Lynch*, 465 U.S. at 676; see also *ibid.* (referring favorably to the National Motto, "In God We Trust," 36 U.S.C. 302, which appears on all United States currency, 31 U.S.C. 324).

Explaining that such official acknowledgments of our Nation's religious heritage do not "establish[] a religion or religious faith, or tend[] to do so," *Lynch*, 465 U.S. at 678, the Court concluded that the City's inclusion of a creche in its Christmas display likewise permissibly "depicts the historical origins of this traditional event long recognized as a National Holiday," *id.* at 680. To hold otherwise, the Court explained, would lead to the conclusion that "a host of other forms of taking official note of Christmas, and of our religious heritage, are equally offensive to the Constitution." *Id.* at 686. "[P]ublic acknowledgment of the [Nation's] religious heritage long officially recognized by the three constitutional branches of government," the Court concluded, render "farfetched" "[a]ny notion that these symbols pose a real danger of establishment of a state church." *Ibid.*

In *County of Allegheny* v. *ACLU*, 492 U.S. 573 (1989), the Court invalidated the display of a creche at a county courthouse, but sustained the inclusion of a menorah as part of a holiday display. In so holding, the Court reaffirmed *Lynch*'s approval of the reference to God in the Pledge, noting that

all of the Justices in *Lynch* viewed the Pledge as "consistent with the proposition that government may not communicate an endorsement of religious belief." *Id.* at 602-603 (citations omitted). The Court then used the Pledge and the general holiday display approved in *Lynch* as benchmarks for what the Establishment Clause permits, *ibid.* On that basis, the Court concluded that the display of the creche by itself was unconstitutional because, unlike the Pledge, it gave "praise to God in [sectarian] Christian terms." *Id.* at 598; see also *id.* at 603 (finding an "obvious distinction" between the Pledge and the display of the creche).

Furthermore, while not referring specifically to the Pledge of Allegiance, the Court, in *Marsh* v. *Chambers*, 463 U.S. 783 (1983), upheld the historic practice of legislative prayer as "a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.* at 792. In so holding, the Court discussed numerous other examples of constitutionally permissible religious references in official life "that form 'part of the fabric of our society,'" *ibid.*, such as "God save the United States and this Honorable Court," which "occurs at all sessions of this Court," *id.* at 786. The Court also repeated its recognition that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Id.* at 792.

Likewise, in *Abington Township*, *supra*, the Court explained, in the course of invalidating laws requiring Bible-reading in public schools, that "our national life reflects a religious people," and noted the numerous permissible public references to God in historical documents and ceremonial practices, such as oaths ending with "So help me God." 374 U.S. at 213.

Finally, in *Engel* v. *Vitale*, 370 U.S. 421 (1962), in the course of invalidating official school prayers, the Court stressed:

> There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise [official prayer] that the State of New York has sponsored in this instance.

Id. at 435 n.21.

In sum, this Court has repeatedly refused to "press the concept of separation of Church and State to * * * extremes" and to condemn as unconstitutional the "references to the Almighty that run through our laws, our public rituals, [and] our ceremonies." *Zorach*, 343 U.S. at 313.

b. The opinions of individual Justices have cemented as common ground the proposition that the Pledge of Allegiance, and similar acknowledgments of the Nation's religious heritage and character, are constitutionally permissible. See *Lee* v. *Weisman*, 505 U.S. 577, 633-635 (1992) (Scalia, J., dissenting, joined by Rehnquist, C.J., and White & Thomas, JJ.) (noting long historical practice, consistent with the Establishment Clause, of official references to God); *id.* at 638-639 (noting that the Court's invalidation of graduation prayer did not extend to the practice of also saying the Pledge of Allegiance at graduations); *County of Allegheny*, 492 U.S. at 623, 625 (O'Connor, J., concurring) ("government recognition and acknowledgment of the role of religion in the lives of our citizens" serve the "secular purposes of 'solemnizing public occasions, expressing confidence in the future

and encouraging the recognition of what is worthy of appreciation in society'"; in addition, because of their "history and ubiquity, such government acknowledgments of religion are not understood as conveying an endorsement of particular religious beliefs") (internal quotation marks omitted); *id.* at 657 (Stevens, J., concurring in part and dissenting in part, joined by Brennan & Marshall, JJ.) ("Government policies of * * * acknowledgment, and support for religion are an accepted part of our political and cultural heritage."); *id.* at 674 n.10 (Kennedy, J., concurring in part and dissenting in part, joined by Rehnquist, C.J., and White & Scalia, JJ.) (explaining that the Court "will not proscribe" "the reference to God in the Pledge of Allegiance" and similar acknowledgments of religious culture); *Wallace* v. *Jaffree*, 472 U.S. 38, 78 n.5 (1985) (O'Connor, J., concurring) (same view as in *County of Allegheny*, with specific reference to the Pledge of Allegiance); *id.* at 88 (Burger, C.J., dissenting) (the argument that the Pledge of Allegiance, with its reference to God, violates the Establishment Clause "would of course make a mockery of our decisionmaking in Establishment Clause cases"); *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring) (same view as in *County of Allegheny* with respect to "In God We Trust" and "God save the United States and this honorable court"); *Abington Township*, 374 U.S. at 304 (Brennan, J., concurring) ("The reference to divinity in the revised pledge of allegiance, for example, may merely recognize the historical fact that our Nation was believed to have been founded 'under God.' Thus reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact."); *id.* at 303 (The Pledge and similar acknowledgments of religion are "interwoven * * * so deeply into the fabric of our civil polity" that their "use may not present that type of involvement which the First Amendment prohibits."); *id.* at

307-308 (Goldberg, J., concurring, joined by Harlan, J.) ("[T]oday's decision does not mean that all incidents of government which import of the religious are therefore and without more banned by the strictures of the Establishment Clause," citing to divine references in the Declaration of Independence and the National Anthem); *Engel*, 370 U.S. at 449 (Stewart, J., dissenting) (citing as consistent with the Establishment Clause the then recently amended Pledge of Allegiance, the National Motto "In God We Trust," and the National Day of Prayer).

c. The court of appeals dismissed that overwhelming and consistent authority as "dicta" that was "not inconsistent" with its invalidation of the Pledge. App., *infra*, 15a. While the court of appeals is correct that none of those cases involved direct challenges to the Pledge, it fundamentally erred in disregarding this Court's consistent statements validating the Pledge. That is because, "[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." *Seminole Tribe* v. *Florida*, 517 U.S. 44, 67 (1996). The Court's analysis of the Pledge and similar official acknowledgments of religion in *Lynch* and *County of Allegheny* were not "mere *obiter dicta*" that the court of appeals was free to disregard. *Id.* at 66. They were components of the "well-established rationale upon which the Court based the results of its earlier decisions." *Id.* at 66-67. Those references articulated the constitutional baseline for permissible official acknowledgments of religion under the Establishment Clause against which the governmental practices at issue in each of those cases were then measured. Indeed, for decades, the Court and individual Justices "have grounded [their] decisions in the oft-repeated understanding," *id.* at 67,

that the Pledge of Allegiance, and similar references, are constitutional.[6]

The court of appeals' failure to recognize the analytical import of this Court's past decisions and statements underlies its erroneous conclusion that recitation of the Pledge of Allegiance in schools violates the Establishment Clause. First, in concluding that the Pledge results in unconstitutional coercion, the court of appeals failed to come to grips with this Court's repeated recognition that the Establishment Clause permits such historic, ubiquitous, and ceremonial acknowledgments of our Nation's religious character and heritage. See *Lynch*, 465 U.S. at 675, 677 (concluding that the words "under God" in the Pledge are an "acknowledgment of our religious heritage" similar to the "official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers" that are "replete" in our nation's history). Such references are not reasonably and objectively understood as coercing individuals into silent assent to any particular religious doctrine. Rather, the Pledge is "consistent with the proposition that government may not communicate an endorsement of religious belief," *County of Allegheny*, 492 U.S. at 602-603, because the ceremonial reference to God acknowledges the undeniable historical facts that the Nation was founded by individuals who believed in God, that the Constitution's protection of individual rights and autonomy reflects those religious convictions, and that the Nation

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[6] See also *County of Allegheny*, 492 U.S. at 668 (Kennedy, J., concurring in part and dissenting in part) ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law."); *Local 28 of the Sheet Metal Workers' Int'l Ass'n* v. *EEOC*, 478 U.S. 421, 490 (1986) (O'Connor, J., concurring) ("Although technically dicta, * * * an important part of the Court's rationale for the result [that] it reache[s] * * * is entitled to greater weight.").

continues as a matter of demographic and cultural fact to be a predominantly "religious people whose institutions presuppose a Supreme Being." *Zorach*, 343 U.S. at 313.

Second, as Judge O'Scannlain explained in his dissent from the denial of rehearing en banc, App., *infra*, 69a-71a, 79a-83a, the court of appeals' decision proceeds from the faulty premise that the Pledge's acknowledgment of the Nation's religious heritage is the functional equivalent of prayer or a religious act like Bible reading. The decisions of this Court and individual Justices outlined above repeatedly admonish that not every reference to God amounts to impermissible government-endorsed religious exercise, and expressly refer to the Pledge and similar ceremonial references in contradistinction to formal religious exercises like prayer and Bible reading. See, *e.g.*, *Lynch*, *supra*; *Abington Township*, *supra*; *Engel*, *supra*. The Pledge is no more of a coercive religious exercise than the requirement at the opening of federal courts that individuals stand while a court official announces "God save the United States and this honorable Court."

Third, the court of appeals erred in analyzing the phrase "under God" in isolation. In the court's view, pledging allegiance to the phrase "under God" compelled an endorsement of monotheism in the same manner as phrases like "under Jesus," "under Vishnu," or "under Zeus." App., *infra*, 12a. But Congress did not enact a pledge consisting just of the words "under God," and the school district does not lead students in reciting only the phrase "under God." Nor did Congress enact a pledge to God. Individuals pledge allegiance to "the Flag of the United States of America," and "to the Republic for which it stands." 4 U.S.C. 4. The remainder of the Pledge then describes the culture and character of that Republic—a unified Country, composed of individual States yet indivisible as a Nation, founded for the purposes of promoting liberty and justice for all, *and*

founded by individuals who believed (and populated predominantly by people who continue to believe) that the Nation's character and destiny were rooted in the Divine.

In analyzing only Newdow's discomfiture with the phrase "under God," without considering its larger context, the court of appeals "plainly erred." *Lynch*, 465 U.S. at 680. In *Lynch*, this Court stressed that the Establishment Clause analysis looks at religious symbols and references in context, rather than "focusing almost exclusively on the" religious symbol alone. *Ibid.* The *Lynch* Court accordingly did not ask whether the government's display of a creche—a clearly religious symbol—was permissible. The Court analyzed whether the overall message conveyed by a display that included both that religious and other secular symbols of the Christmas holiday season conveyed a message of endorsement, and concluded that it did not. *Id.* at 680-686. The presence of the creche, the Court concluded, properly "depict[ed] the historical origins of this traditional event," *id.* at 680, and permissibly took "official note of Christmas, and of our religious heritage," *id.* at 686.

Likewise, in *County of Allegheny*, the Court analyzed and upheld the "combined display" during the winter holiday season of a Christmas tree, Liberty sign, and menorah. 492 U.S. at 616. The Court thus looked at the content of the display as a whole, rather than focusing on the presence of the menorah and the religious message that the menorah alone conveys. *Id.* at 616-620.

That Congress added the phrase "under God" to a preexisting Pledge does not change the analysis. The city government in *County of Allegheny* had likewise added the menorah, after the fact, to a preexisting holiday display. *Id.* at 581-582. Yet this Court trained its constitutional analysis on the display as a whole, rather than scrutinizing the message conveyed by each component as it was added seriatim. *Id.* at 616-620 & n.64; see also *Zelman* v. *Simmons-Harris*,

536 U.S. 639, 655-657 (2002) (noting that the Establishment Clause inquiry must consider all relevant programs, not just the specific program challenged); *id.* at 672-676 (O'Connor, J., concurring) (same); *Wallace*, 472 U.S. at 78 n.5 (O'Connor, J., concurring) (later addition of "under God" to Pledge does not violate the Establishment Clause because it "serve[s] as an acknowledgment of religion with the 'legitimate secular purpose of solemnizing public occasions, [and] expressing confidence in the future'").

The court of appeals attempted to distinguish the Pledge from other references to God in public life on the ground that the Pledge is "a performative statement," rather than simply "a reflection of [an] author's profession of faith." App., *infra*, 16a. As an initial matter, this Court's pronouncements have made no such distinction, consistently grouping the Pledge with the Motto, National Anthem, the Declaration of Independence, and similar public references, some of which frequently involve public performance (*e.g.*, the National Anthem) and some of which do not.

More importantly, the distinction makes no sense. With respect to "impressionable young schoolchildren," *id.* at 15a, there simply is no coherent or discernible "performative" difference between having them say the Pledge, rather than memorize and recite the National Motto ("In God *We Trust*"), 36 U.S.C. 302 (emphasis added), the Declaration of Independence, 1 U.S.C. at XLIII ("We hold these truths to be self-evident, that all men * * * are endowed by their Creator with certain unalienable Rights * * *."), or the Gettysburg Address ("[W]e here highly resolve * * * that this nation, under God, shall have a new birth of freedom."). Indeed, the court of appeals' approach leads to the curious conclusion that the recitation of Bible passages or long-established prayers in public schools, which would require students "merely to repeat the words of an historical document," App., *infra*, 16a, trenches less upon Establishment

Clause principles than the Pledge's two-word acknowledgment of the Nation's religious heritage. That conclusion cannot be reconciled with this Court's precedent or established analytical principles guiding Establishment Clause jurisprudence.

d. This Court's review is warranted because the Ninth Circuit's decision squarely conflicts with the Seventh Circuit's decision in *Sherman* v. *Community Consolidated School District 21*, *supra*, that the Pledge of Allegiance may constitutionally be recited in public elementary schools. Unlike the court of appeals here, the Seventh Circuit placed significant weight on this Court's repeated approval of the Pledge and similar official acknowledgments of religion, and concluded that the lower federal courts must "take [the Supreme Court's] assurances seriously." 980 F.2d at 448. Indeed, the Ninth Circuit acknowledged that its decision creates an inter-circuit conflict and that the courts' differing decisions were the product of different modes of analyzing Establishment Clause challenges to such official acknowledgments of religion. App., *infra*, 16a-17a. This Court's authoritative resolution of the question is therefore necessary.[7]

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[7] The Ninth Circuit's decision is also in considerable tension with court of appeals' decisions upholding analogous acknowledgments of the Nation's religious history and character. See *Gaylor* v. *United States*, 74 F.3d 214 (10th Cir.) (upholding against Establishment Clause challenge the National Motto, "In God We Trust," and its imprint on all currency), cert. denied, 517 U.S. 1211 (1996); *O'Hair* v. *Murray*, 588 F.2d 1144 (5th Cir.) (upholding National Motto), cert. denied, 442 U.S. 930 (1979); *Aronow* v. *United States*, 432 F.2d 242 (9th Cir. 1970) (same); *Ganulin* v. *United States*, 71 F. Supp. 2d 824 (S.D. Ohio 1999) (upholding constitutionality of 5 U.S.C. 6103, which makes Christmas Day a paid federal holiday), aff'd, 238 F.3d 420 (6th Cir. 2000), cert. denied, 532 U.S. 973 (2001); *Opinion of the Justices*, 228 A.2d 161 (N.H. 1967) (posting of plaques in all public school classrooms bearing the National Motto, "In God We Trust," would not violate the Establishment Clause).

e. The question presented is one of great importance. An Act of Congress has been held unconstitutional as applied in one of its most important contexts. See *Lynch*, 465 U.S. at 676; pp. 4-5, *supra*; App., *infra*, 14a & n.7. Furthermore, the impact of the decision below is potentially far-reaching. In addition to the practice at federally operated schools for military dependents, see n.2, *supra*, public schools within each of the 50 States lead students in voluntary recitations of the Pledge of Allegiance, see Idaho C.A. Amicus Curiae Br. 9-13 (citing state laws). It is untenable that a national Pledge of Allegiance to a national flag would have a different content depending on the judicial circuit in which it is uttered. Absent this Court's review, 9.6 million students in nine States (App., *infra*, 69a) will recite an abridged version of the Pledge, while the nearly 37 million students in the rest of the Country will recite the Pledge that Congress enacted. Students in the Ninth Circuit will also learn a different Pledge in school than they recite at other public and private events. The Pledge cannot serve its purpose of unifying and commonly celebrating the national identity unless it is one Pledge with one content for all citizens at all points in their lives. There is no reason to tolerate such disruption and disharmony in the schools of this Nation. The Pledge of Allegiance is constitutional. This Court has repeatedly said so, and federal and state schools have acted in reliance on those assurances. The Ninth Circuit's disregard of this Court's decisions and their underlying analytical principles merits review.

2. The issue of Newdow's standing to bring his constitutional challenge is a necessarily antecedent question that this Court would need to address were it to grant review. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). Although it is the court of appeals' erroneous ruling on the merits that warrants this Court's review, the court of appeals also committed three errors in concluding that

Newdow's status as a noncustodial parent did not deprive him of standing to challenge an educational practice at his child's school.[8]

First, and most fundamentally, Newdow has not suffered the invasion of any legally protected interest. A number of this Court's Establishment Clause cases have involved lawsuits by parents challenging practices or policies in public schools. See, *e.g.*, *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290 (2000); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Lee* v. *Weisman*, 505 U.S. 577 (1992); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). In all of those cases, however, the parents had the legal right to sue as next friend to vindicate their children's legal interests and to protect the parents' own constitutional rights to direct and control the religious and educational upbringing of their children, see *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534-535 (1925).

Newdow can assert neither right. He has no legal right to sue as his child's next friend, or otherwise seek to vindicate his child's legal interests, as the court of appeals recognized. App., *infra*, 96a. That prerogative rests exclusively with the mother, who has sole legal custody. *Ibid.* While Newdow retains the right to "consult" with the mother on educational decisions and to have "access" to the child's educational records, *id.* at 91a, Newdow does not allege that Elk Grove's

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[8] While the standing issue is necessarily antecedent to the merits of the Establishment Clause analysis, see *Steel Co.*, *supra*, this Petition presents the Establishment Clause issue first because the court of appeals' erroneous constitutional judgment clearly merits this Court's review. Whether or not the Ninth Circuit's erroneous standing analysis would independently merit an exercise of this Court' s certiorari jurisdiction, it does not pose a barrier to review in this case. The Ninth Circuit's standing analysis is closely intertwined with its flawed Establishment Clause ruling, and the decision below, which not only erroneously invalidates the Pledge of Allegiance, but did so at the behest of a party without Article III standing, should not be allowed to stand.

use of the Pledge in its schools interferes with either of those rights. Nor, contrary to the court of appeals' opinion, does Newdow have any right "to direct the religious education of his daughter." *Id.* at 7a. The custody order granted sole control over the child's "health, education and welfare" to the mother. *Id.* at 90a-91a. And the mother has made clear that she "wants her daughter to recite the Pledge as it stands as part of her education," Banning C.A. Mot. to Intervene 10.[9]

Where, as here, the two parents disagree on an educational practice, the decision of the custodial parent controls and Newdow has no right to overturn it. If, as the noncustodial parent, Newdow believes the mother's educational decisions are causing harm to the child, the proper remedy is for him to resort to family court and seek a modification of the custody agreement. He cannot use federal litigation to circumvent that state-law process or to modify a state-law custody judgment. See *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462, 482 (1983); *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923).[10]

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[9] See also *Burge* v. *City & County of San Francisco*, 262 P.2d 6, 12 (Cal. 1953) (status as custodial parent "embrace[s] the sum of parental rights with respect to the rearing of a child, including its care. It includes the right * * * to direct his activities and make decisions regarding his care and control, education, health, and religion."); cf. *Michael H.* v. *Gerald D.*, 491 U.S. 110, 122-129 (1989).

[10] In apparent recognition of that limitation, the United States understands that Newdow has filed a motion in California Superior Court to alter the custody arrangement. That motion remains pending with a hearing date scheduled for July 31, 2003.

The court of appeals relied (App., *infra*, 92a-94a) on the Seventh Circuit's decision in *Navin* v. *Park Ridge School District*, 270 F.3d 1147 (2001) (per curiam), which held that a noncustodial father *might* be able to sue to enforce his son's rights under the Individuals with Disabilities Education Act, 20 U.S.C. 1415. In that case, however, the court concluded that the divorce decree did not strip the father of his parental interest in

Second, the court of appeals placed weight upon Newdow's residual right, under California law, to "expose" his child to his views. App., *infra*, 95a. But, again, Newdow has not alleged that Elk Grove or the United States has denied him any opportunity to expose his child to his particular viewpoints.

The court of appeals went further, however, and held that Newdow has a right not to have his message to his child interrupted or diluted by the government's educational practices. But, especially when that speech occurs with the consent of the custodial parent, the right of the non-custodial parent to "expose" the child to his views does not entitle that parent to close off all other views. Public schools routinely instruct students about evolution, war, and other matters with which some parents may disagree on religious, political, or moral grounds. What the Constitution protects, in those circumstances, is the parents' right to instill their own views in their children and to place them in a private school that is more consonant with their beliefs. See *Pierce*, *supra*.[11]

The court of appeals further erred in suggesting that Newdow's limited state-law right was somehow enhanced by that court's erroneous conclusion that his Establishment Clause challenge was meritorious. The court repeatedly

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ensuring the quality of his child's education. 270 F.3d at 1149. The court stressed, moreover, that the noncustodial parent could not use federal law "to upset choices committed to [the mother] by the state court," *id.* at 1150, which is exactly what Newdow's lawsuit attempts to do.

[11] Cf. *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 630 (1943) (holding only that children whose parents have religious objections to the content of the Pledge have a right not to participate in its recitation in a classroom, where their refusal "does not interfere with or deny rights of others to do so"); *Wooley* v. *Maynard*, 430 U.S. 705, 717 (1977) (the government "may legitimately" "communicate to others an official view as to proper appreciation of history, state pride, and individualism," as long as individuals are not forced to "becom[e] the courier for such message[s]").

couched Newdow's purported Article III injury in terms of a right not to have his daughter "subjected to *unconstitutional* state action" and "official state indoctrination of * * * an official view of religion." App., *infra*, 96a (emphasis added). See also *id.* at 97a (the mother "may not consent to *unconstitutional* government action in derogation of Newdow's rights") (emphasis added).

That approach, however, confuses the standing inquiry with the ultimate question on the merits. The type of injury that Article III requires must be discernible separate and apart from the ultimate resolution of the case. The plaintiff must identify some action by the opposing party that affects the plaintiff's particularized, individual rights concretely and imminently—regardless of whether that action ultimately is found to be lawful or not. "The requirement of standing 'focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982); see also *Schaffer* v. *Clinton*, 240 F.3d 878, 883 (10th Cir.) (denying standing where it "revolves around the asserted unconstitutionality of the [conduct as that] is a statement of [plaintiff's] view of the merits * * * and no more"), cert. denied, 534 U.S. 992 (2001).

Third, even if Newdow possesses some federal right not to have his message of atheism affected by his child's exposure to the Pledge, the court of appeals' limited invalidation of the Pledge in elementary schools does not redress that injury. Newdow's child remains subject to exposure to the Pledge in a wide variety of other assemblies and settings, public or private. In addition, the child's mother could place the child in private school where the official governmental Pledge could be recited daily. Unless the Establishment Clause compels courts to root out every reference to religion in public life, the relief ordered by the court here is incapable of

inoculating Newdow's message of atheism against any perceived dilution.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal of the court of appeals' judgment.

Respectfully submitted.

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